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No. 87-1346

In the Supreme Court of the United States

OCTOBER TERM, 1987

BONITO BOATS, INC.,
Petitioner,

vs.

THUNDER CRAFT BOATS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMICI CURIAE MARINE INDUSTRIES ASSOCIATION OF SOUTH FLORIDA AND THE ATTORNEY GENERAL OF THE STATE OF FLORIDA IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

Marine Industries Association of South Florida is a non-profit trade association incorporated in Florida since 1967 as a §501(c)(6) corporation. The Association represents members of the recreational boating industry in South Florida, especially the area of Broward, Dade and Palm Beach Counties. The Association consists of over 500 members of which approximately 40 firms, including Bertram Yacht and Chris-Craft, are boat manufacturers. The Association, therefore, has a vital interest in the validity of Fla. Stat. §559.94 (1987) which protects boat manufacturers from unfair competition.

The Attorney General of the State of Florida is the chief state legal officer, Fla. Const. art. IV, §4(c), and is a proper party in any action in which the constitutionality of a state statute is challenged. *State of Florida ex rel. Shevin v. Kerwin*, 279 So.2d 836 (Fla. 1973); Fla. Stat. §16.01(4) (1987). The attorney general has not previously been heard in the case at bar.

SUMMARY OF ARGUMENT

The Supreme Court of Florida erroneously distinguished precedents of this Court and held that Fla. Stat. §559.94 which prohibits the copying of unpatented boat hulls by the direct molding method is pre-empted by federal patent laws. Section 559.94 is not pre-empted by any of the three possible methods of pre-emption. Congress has not expressly pre-empted state laws such as section 559.94, and has left room in the area of patent law for state regulations which do not conflict with the objectives of the federal patent laws. Section 559.94 does not conflict with the federal patent law policies of encouraging invention and disclosure and ensuring that ideas remain in the public domain.

Although this Court has held that states may not prohibit copying of unpatented articles, states remain free to regulate unfair methods of competition. The State of Florida validly exercised this power by enacting section 559.94 to prevent one unfair method of copying unpatented boat hulls. Section 559.94 does not *prohibit* the copying of unpatented boat hulls and component vessel parts; it merely restricts one of many possible methods of copying, and falls far short of providing the equivalent of a patent. Additionally, section 559.94 does not remove any article from the public domain. The unpatented boat hulls remain in the public domain and may be copied at will. Until Congress takes affirmative action to the contrary, states should remain free to regulate unfair methods of manufacture. This Court should reverse the decision of the Supreme Court of Florida and find section 559.94 constitutional.

ARGUMENT

I. Florida Statutes Section 559.94 Is Not Pre-Empted By Federal Patent Law

In *California Federal Savings & Loan Association v. Guerra*, 479 U.S. ....., 93 L.Ed.2d 613, 107 S.Ct. 683 (1987), this Court recognized that, while pre-emption of state law is not to be lightly presumed, federal law may supersede state law in three instances. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. Second, where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress has left no room for supplementary state regulation, congressional intent to pre-empt state law in a particular area may be inferred. Third, state law may be pre-empted to the extent that it actually conflicts with federal law. 93 L.Ed 2d at 623.

Section 559.94 is not pre-empted by any of these possible means. First, Congress has not expressly pre-empted state laws regarding the direct molding process. Second, although federal patent law is comprehensive, Congress *has* left room for supplementary state regulation. Finally, section 559.94 does not conflict with federal law.

A. Congress Has Not Expressly Stated That State Law Is Entirely Pre-Empted By Federal Patent Law

Congress has not expressly stated that state law is entirely pre-empted by federal patent law. In the analogous area of copyrights, Congress has passed a specific statute on the issue of pre-emption, 17 U.S.C. §301(a) (1982), but no similar statute exists regarding the patent laws. Therefore, state law is pre-empted only if Congress has left no room for supplementary state regulation or if it actually conflicts with federal law.

B. Room Exists For Supplemental State Regulation of Unpatentable Articles

Congress has left room for state regulation of unpatentable articles. Despite the assertion to the contrary by the Supreme Court of Florida, Congressional failure to protect certain articles with a patent does not pre-empt states from providing some protection for those articles. For example, in *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979), this Court recognized a state's power to regulate the use of intellectual property in any manner not inconsistent with federal law. *Id.* at 262 (citing *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 479 (1974)).

Similarly, in the analogous area of copyright law, Congress clearly stated its intent to pre-empt *only* those state created rights which are the *equivalent* of the exclusive

rights created by federal copyright law. 17 U.S.C. §301 (a) (1982). For example, in *Ehat v. Tanner*, 780 F.2d 876 (10th Cir. 1985), *cert. denied*, 93 L.Ed.2d 39, 107 S.Ct. 86 (1986), the Tenth Circuit found that the Plaintiff's common law claims were pre-empted by federal copyright law, stating that Congress clearly intended to pre-empt any attempt to provide the equivalent of copyright protection to works which could not qualify for federal copyright protection. *Id.* at 878. In the analogous area of patent law, although Congress has not explicitly stated its intent, presumably Congress intended to leave some room for state regulation. Congress knows how to expressly pre-empt the states from providing *any* protection whatsoever to unpatentable articles. This Court has correctly interpreted Congressional intent as allowing states to provide some protection to unpatentable articles if the protection is not the equivalent of patent rights. *Kewanee*, 416 U.S. 470.

C. Section 559.94 Does Not Clash With The Objectives Of Federal Patent Law

Under the foregoing analysis, since Congress has not expressly pre-empted state law, and since room exists for supplemental state regulation, state law is not pre-empted unless it "clashes with the objectives of the federal patent laws." *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 (1963). In determining whether a conflict exists between state and federal law, the analysis "involves a consideration of whether the law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Aronson*, 440 U.S. at 262 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). If no conflict exists, state law governs. *Id.*

Respondent argued to the Supreme Court of Florida that the three objectives of federal patent laws are: "1) free competition; 2) promotion of invention; and 3) ultimate full disclosure of the details of the novel article." Answer Brief of Appellee at 15-16. Furthermore, Respondent argued that the effect which a state law has on free competition is the threshold question. However, Respondent cited no authority for its assertions. Apparently Respondent relied on this Court's statement that "the patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition." *Sears*, 376 U.S. at 230-31 (footnote omitted).

Despite Respondent's argument to the contrary, nowhere in *Sears* did this Court state that the preservation of free competition is the central policy objective of the patent laws. Indeed, fifteen years later in *Aronson* this Court specifically enunciated the purposes of federal patent laws.

> First, patent law seeks to foster and reward invention; second, it permits disclosure of inventions to stimulate further innovation and to permit the public to practice the invention once the patent expires; third, the stringent requirements for patent protection seek to assure that ideas in the public domain remain there for the free use of the public.

440 U.S. at 262. Section 559.94 does not stand as an obstacle to the accomplishment and execution of these objectives and, therefore, does not clash with federal patent laws. The Supreme Court of Florida failed to consider whether section 559.94 can exist in harmony with federal patent laws. As a thorough analysis reveals, the statute does not conflict with the stated objectives of the patent laws and, in fact, furthers those objectives.

1. Section 559.94, like the Patent laws, seeks to foster and reward invention

Section 559.94 prohibits one specific method of manufacture: the direct molding method in the manufacture of boat hulls and component parts. This method of manufacture allows a competitor to sit idle and wait for another manufacturer to invest the time, effort and cost necessary to develop and perfect an original hull. The Florida Legislature estimates that "the cost to an original manufacturer for the design, engineering, and tooling (mold) for the average [twenty-six] foot boat is in excess of one hundred thousand dollars." Staff of Fla. S. Comm. on Transportation, SB 880 (1983) Staff Analysis (April 29, 1983) (on file with committee) (copy contained in the Appendix to this Brief). However, by using the direct molding method, a competitor avoids these extensive research and development costs by obtaining an original hull and using it as a "plug" for making a female mold. The competitor then sells its product at a price substantially less than the original manufacturer's cost. To prevent this unscrupulous form of competition, the Florida Legislature enacted section 559.94. This statute merely prohibits use of the direct molding process in the manufacture of boat hulls or component parts. The statute *does not prohibit* copying the design of the product; competitors may copy the product in every detail.

The direct molding process, if permitted to persist, will result in ruinous competition. Under this process, an original manufacturer is unable to recover the costs invested in the research and development of new boat designs. As a result, manufacturers have no incentive

to engage in research and development activities. Indeed, with the direct molding process available, the prudent manufacturer waits for a competitor to assume the expense and labor of designing and constructing the tooling required to produce a new design. Thus, the direct molding process acts as a hinderance to the discovery and invention of new boat designs by removing the incentive necessary to induce independent design and manufacture. Prohibiting this method of manufacture, however, induces innovative designs and fosters development by preventing unscrupulous and ultimately ruinous competition.

At the same time, the statute preserves free competition by allowing boat hulls to be copied in every detail by competitors. Thus, even assuming free competition is a central policy of the patent laws, section 559.94 does not conflict with that policy. "Free competition" does not mean unfair competition. Nor does it mean completely unregulated competition. Free competition is permitted in the manufacture of boat hulls. The only restriction is that competitors may not use the direct molding method, otherwise the boat hulls "can be copied at will." *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 238 (1964). Therefore, the statute, like the patent laws, seeks to foster and reward invention while preserving free competition. "Certainly, the patent policy of encouraging invention is not disturbed by the existence of another form of incentive to invention. In this respect the systems are not and never would be in conflict." *Kewanee*, 416 U.S. at 484.

2. Section 559.94 does not conflict with the patent policy of disclosure

The Constitution empowers Congress "To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. Const. art. I, §8, cl. 8. In return for this right of exclusion, the patent laws require the inventor to disclose a "full and clear description of the invention and of the manner and process of making and using [the invention]." *Kewanee*, 416 U.S. at 480-81. The additions to the general store of knowledge provided by such disclosure

> are of such importance to the public weal that the Federal Government is willing to pay the high price of 17 years exclusive use for its disclosure, which disclosure, it is assumed, will stimulate ideas and the eventual development of further significant advances on the art.

Id. at 481.

In *Kewanee*, this Court addressed the issue of whether state trade secret protection is pre-empted by operation of the federal patent law. The Court analyzed the effect of Ohio's trade secret law on three categories of discoveries: those which are unpatentable, those which are doubtfully patentable, and those which are patentable. In holding that Ohio's trade secret laws were not pre-empted, this Court observed that, in the realm of unpatentable discoveries, "the holder of such a discovery would have no reason to apply for a patent whether trade secret protection existed or not. Abolition of trade secret protection would, therefore, not result in increased disclosure to the public. . . ." 416 U.S. at 483. The same is true with respect to Florida's

anti-direct molding statute. If a vessel hull is clearly unpatentable, the patent policy of disclosure will not be furthered by abolition of section 559.94. Regardless of the existence of the statute, no patent could be issued and the manner and process of making the discovery is not disclosed. However, the statute, by prohibiting use of the direct molding process, provides incentive to manufacturers to design and disclose a wider selection of boat designs. Once designed, the hull is disclosed by being placed in the public domain. Competitors are free to copy the new hull in every detail.

This Court also recognized that the patent policy of disclosure will not be furthered by the abolition of state trade secret protection in the realm of doubtfully patentable discoveries. The Court reasoned that, due to the increase in patent applications, more invalid patents would probably be issued if trade secret laws were abolished. Since an invalid patent is so serious a threat to the free use of ideas already in the public domain, "[e]liminating trade secret law for the doubtfully patentable invention is . . . likely to have deleterious effects on society and patent policy. . . ." *Id.* at 488-89. The same is true with respect to Florida's anti-direct molding statute. Abolition of this statute will encourage some manufacturers with vessel hulls of doubtful patentability to apply for a patent who otherwise would not have done so. For "some of those [manufacturers] so encouraged, no patent will be granted and the result will [be] an unnecessary postponement in the divulging of the [new vessel design to the public]." *Id.* at 488.

Similarly, if a discovery is patentable, this Court recognized that the patent policy of disclosure would not be harmed by the existence of trade secret laws which provide

far weaker protection than the patent laws. Florida's anti-direct molding statute provides far weaker protection than the patent laws. Therefore, the statute will not deter manufacturers from seeking patent protection for clearly patentable designs. The statute merely prohibits competitors from using the direct molding process, while "patent law operates against the world, forbidding *any use* of the invention for whatever purpose for a significant length of time." *Id.* at 489-90 (emphasis added). Thus, Florida's anti-direct molding statute will not interfere with the patent policy of disclosure, regardless of whether the discovery is unpatentable, doubtfully patentable, or patentable.

3. Section 559.94 does not remove items from the public domain

The Supreme Court of Florida relied on the decisions of this Court in *Sears* and *Compco* in declaring section 559.94 unconstitutional. However, this reliance is misplaced. The state laws at issue in *Sears* and *Compco* each provided the functional equivalent of a patent to unpatentable items by *prohibiting all* methods of copying the unpatented articles. These laws "had the effect of removing the unpatented items from the public domain, thus, conflicting with federal patent policy. In contrast, Section 559.94, Florida Statutes (1983), does not prohibit the copying of an unpatented item. It prohibits one method of copying; the item remains in the public domain." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 515 So.2d 220, 223 (Fla. 1987) (Shaw, J., dissenting).

The *Sears-Compco* court was not presented with, nor did it address the issue presented by the case at bar, i.e., whether a state may prohibit one unfair method of

manufacturing an unpatented item if it otherwise allows the item to be sold and copied in every detail. This Court was clearly concerned in *Sears-Compco* with complete prohibition of copying unpatented articles, which the Court saw as "too great an encroachment on the federal patent system to be tolerated." 376 U.S. at 232. The Court observed that states could not be permitted "to *block off* from the public something which federal law has said belongs to the public." *Id.* (emphasis added).

In *Compco*, this Court held that the Seventh Circuit's decision could not stand "*[s]ince the judgment below forbids the sale of a copy of an unpatented article. . . .*" 376 U.S. at 239 (emphasis added). Similarly, this Court reversed the lower Court's judgment in *Sears* because the effect of the judgment below "gave Stiffel the *equivalent of a patent monopoly* on its unpatented lamp." 376 U.S. at 233 (emphasis added). Clearly, a state may not provide the functional equivalent of a patent to an unpatentable article nor forbid the selling of a copy of an unpatentable article. Any state law which attempts to do so will certainly conflict with the federal patent laws. Indeed, as this Court observed in *Goldstein v. California*, 412 U.S. 546 (1973):

> Congress [has] balanced the need to encourage innovation and originality of invention against the need to insure competition in the sale of identical or substantially identical products. [Thus] . . . [t]he application of state law in [the realm of patent law] to *prevent* the copying of articles which [do] not meet the requirements for federal protection [will disturb] the careful balance which Congress [has]

> drawn and thereby necessarily [give] way under the Supremacy Clause of the Constitution.

Id. at 569-70 (emphasis added). However, section 559.94 *does not prevent* the copying of unpatentable articles. Similarly, the statute does not provide the equivalent of a patent monopoly nor otherwise conflict with the federal patent laws.

In *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969), this Court observed that the patent laws provide "[a] patentee [with] the *exclusive right* to manufacture, use, and sell his invention." *Id.* at 135 (emphasis added) (citations omitted). However, in interpreting California's anti-direct molding statute[1] in *Interpart Corp. v. Italia*, 777 F.2d 678 (Fed. Cir. 1985), a statute substantially similar to section 559.94, the Federal Circuit Court concluded the statute:

> does not give the creator of the product the right to exclude others from making, using, or selling the product as does the patent law. The statute does not preclude one from photographing, measuring, or in any way utilizing the concept of the design of the product. It does not preclude copying the product by hand, by using sophisticated machinery, or by any method other than the direct molding process.

Id. at 684-85. The same is true with respect to Florida's anti-direct molding statute. Thus, section 559.94 does not provide the functional equivalent of a patent, nor violate this Court's mandate that "[a]n unpatentable article . . . is in the public domain and may be *made and sold* by whoever chooses to do so." *Sears*, 376 U.S.

1. Cal. Bus. & Prof. Code §17300 (West Supp. 1985).

at 231 (emphasis added). Indeed, the public and competitors have "every right to do [this under the statute]." *Id.*

The Supreme Court of Florida dismissed the Federal Circuit's decision in *Interpart* as "a misapplication of the *Sears/Compco* doctrine." *Bonito Boats*, 515 So.2d at 223. However, the Florida Court, not the Federal Circuit, misapplied this doctrine. This Court's principle "that when an article is unprotected by a patent or a copyright, state law may not *forbid* others to copy that article" is not violated by section 559.94. *Compco*, 376 U.S. at 237. The statute *does not forbid* the copying of an unpatented article, it merely *limits* the way a competitor may *manufacture* an original manufacturer's vessel hull by prohibiting *one method of manufacture*, which the Florida legislature considers unfair.

II. The Supreme Court of Florida Erroneously Distinguished Kewanee And Aronson From The Case At Bar

The Supreme Court of Florida attempted to distinguish *Kewanee* from the case at bar by stating that *Kewanee* involved trade secrets, which by definition are not in the public domain. This attempted distinction, however, is unconvincing for several reasons. *Kewanee* stands for the general proposition that states may provide *some* protection to articles which are unpatentable as long as that protection is not the functional equivalent of a patent and does not conflict with federal patent laws. This Court held "that the cl 8 grant of power to Congress was not exclusive." *Kewanee*, 416 U.S. at 478. This Court has never held, and should not now hold, that if an item is unpatentable it must remain entirely unprotected by state law. The Supreme Court of Florida asserted below, "Either an article in the

public domain is fully protected by patent or it may be copied *in any manner*." 515 So.2d at 222 (emphasis added). The Florida court did not cite any authority for its broad assertion, as indeed it could not, for no such authority exists. This Court has never held that an unpatentable article must remain entirely unprotected. The Supreme Court of Florida stated, "The United States Supreme Court has never ruled that the states *may* selectively enact barriers against some methods of copying unpatented articles." *Id.* at 222 (emphasis added). The converse is also true: the United States Supreme Court has never ruled that the states *may not* selectively enact barriers against some unfair methods of copying unpatented articles. Indeed, by implication this Court has held that states may prohibit some methods of copying unpatented articles. This Court held, for example, that states may constitutionally protect trade secrets. *Kewanee*, 416 U.S. 470. Obtaining trade secrets by unfair means is one method of copying and manufacturing unpatented articles. Thus, this Court has allowed states to prohibit at least one method of copying and manufacturing unpatented articles.

The Supreme Court of Florida attempted to distinguish trade secrets from the direct molding method because trade secrets are not in the public domain. The distinction fails, however, because the *mold* which is produced by the direct molding process is *not* in the public domain. The boat hull is in the public domain, but the mold from which the hull is cast, like a trade secret, is not in the public domain. Indeed, a trade secret may include "a pattern for a machine or other device." *Kewanee*, 416 U.S. at 475 (quoting Restatement of Torts §757, comment b (1939)).

Section 559.94 is analogous to the trade secret law upheld by this Court in *Kewanee*. Both seek to encourage

innovation by preventing competitors from unfairly obtaining information about the original manufacturer's process. Yet neither law prevents "discovery by fair and honest means, such as by independent invention, accidental disclosure, or by so-called reverse engineering, that is by starting with the known product and working backward to divine the process which aided in its development or manufacture." 416 U.S. at 476. Both laws encourage invention by preventing the inventor's competitor from using unfair means to obtain knowledge "without himself paying the price in labor, money, or machines expended by the discoverer." *Kewanee*, 416 U.S. at 482 (citations omitted). In addition, both laws promote the "maintenance of commercial ethics," and

> encourage invention in areas where patent law does not reach, and will prompt the independent innovator to proceed with the discovery and exploitation of his invention. Competition is fostered and the public is not deprived of the use of valuable, if not quite patentable invention.

Id. at 481, 485 (footnote omitted). Furthermore, the laws accomplish the desired result without removing any article from the public domain. The article remains in the public domain and may be manufactured and sold by competitors by any number of methods except *one* particular method, determined by state law to be an unfair method.

The Supreme Court of Florida also erroneously distinguished *Aronson*. The court's attempt to distinguish *Aronson* is even less convincing than the attempts to distinguish *Kewanee*. The court found *Aronson* distinguishable because enforcement of the contract did not conflict

with federal patent laws "because anyone could copy the article." The court apparently overlooked the fact that one competitor, the respondent in *Aronson*, was prohibited from copying the article unless *a royalty fee* was paid to the inventor, even though the article was unpatentable. Section 559.94 allows anyone to copy the article using any method except one method which the Florida legislature has determined to be unfair.

Kewanee and *Aronson* together stand for the proposition that states may provide some protection to unpatentable articles as long as the state laws do not clash with the objectives of the federal patent laws. Section 559.94 does not clash with such objectives. In fact, section 559.94 furthers the patent law objectives of encouraging invention and disclosure and ensuring that articles in the public domain remain there.

CONCLUSION

Based upon the foregoing, this Court should declare section 559.94, Florida Statutes, constitutional and reverse the decision of the Supreme Court of Florida.

Respectfully submitted,

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Dated July 15, 1988

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APPENDIX

REVISED: ..... BILL NO. SB 880
DATE: April 29, 1983 Page 1

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	Analyst	*Staff Director*	*Reference*	*Action*
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2.	.....	.....	2.	.....
3.	.....	.....	3.	.....

SUBJECT: Vessels

BILL NO. AND SPONSOR: SB 880 by Senator McPherson

I. *SUMMARY*:

A. Present Situation:

Because of the type of materials and techniques employed, original manufacturers of fiberglass boats are confronted with the problem of hull "splashing" or "popping" (duplication by the direct molding process) by bootleg manufacturers. Presently there is no legal mechanism available to protect an original manufacturer. In addition, federal law requires that certain vessels have located on its' transom a hull identification number, however, these numbers are easily altered or removed. Because of the easy alteration many manufacturers have also placed secondary numbers in a concealed location.

B. Effect of Proposed Changes:

Section One: Requires all vessels manufactured after the effective date to have a hull identification number prior to sale in accordance with federal rules. In addition, this section would require manufacturers who are required by federal law to number their vessels to provide a unique secondary concealed number in the event the identification number is altered or destroyed.

Section Two: Provides a definition for the direct molding process and makes it unlawful for a person to use the process in duplicating the hull of a vessel made by another without the written permission of that person. This section also prohibits anyone from knowingly selling a duplicated vessel and provides injunctive relief for persons injured by anyone violating the bill's provisions.

II. *ECONOMIC IMPACT AND FISCAL NOTE*:

A. Public: *None*

B. Government: *None*

III. *COMMENTS*:

It is estimated the cost to an original manufacturer for the design, engineering, and tooling (mold) for the average 26 foot boat is in excess of one hundred thousand dollars. Such a bill should provide protection to those legitimate companies in the boat building business. Similar laws exist in California, Texas, and Michigan and bills have been introduced in Tennessee and

New York. The concealed number provisions should provide a mechanism to aid in determining whether the vessel is an original and also aid law enforcement in tracking down ownership of abandoned, lost, or confiscated vessels.

IV. *AMENDMENTS*: *None*